Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-215

JOEL H. DARK - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JOEL H. DARK - - - - - *Petitioner*

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, JOEL H. DARK, respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on May 4, 1979.

OPINIONS BELOW

The Opinion of the Court of Appeals entered on May 4, 1979 (Appendix A) is reported at 597 F. 2d 1097. A Petition for Rehearing With Suggestion of Appropriateness of Rehearing En Banc was timely filed. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing (Appendix B) was entered on June 13, 1979.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit (Appendix A) was entered on May 4, 1979; a timely Petition for Rehearing was denied by Order of the Court of Appeals for the Sixth Circuit (Appendix B) on June 13, 1979; and a timely Motion to Stay Mandate was granted by the Court of Appeals for the Sixth Circuit (Appendix C) on July 3, 1979. A Motion for Extension of Time in Which to File Petition for Writ of Certiorari was mailed on July 26, 1979, which Motion was returned by the Clerk explaining it was out-of-time. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the District Court committed prejudicial error in denying Petitioner his right to present his defense as guaranteed by the Sixth Amendment to the Constitution of the United States.
2. Whether the Petitioner was denied a fair trial when the District Court Judge assumed a tripartite role (consisting of prosecutor, judge and jury) in conducting the trial.
3. Whether the District Court committed prejudicial error in denying Petitioner's request for Jencks Act statements without following statutory procedures, in violation of 18 U.S.C. §3500.
4. Whether Petitioner was denied a fair trial when the District Court applied different standards on

the same issues to the prosecution and defense and an erroneous standard on the vital issue of criminal willfulness.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 18 U.S.C. §3500 provides in pertinent part as follows:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

. . . . . .

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

. . . . . .

STATEMENT OF THE CASE

This is a prosecution under 26 U.S.C. §7203. The case was tried before a jury in the United States District Court for the Middle District of Tennessee, Nashville Division, on May 16 and 17, 1978.

The two-count information charged that the Petitioner willfully failed to make income tax returns on or before the due dates of individual income tax returns reporting income for the years 1973 and 1974.

Petitioner moved the District Court to require the United States attorney to file with the clerk the returned subpoenas served upon witnesses for the government or, in the alternative, to enjoin the introduction of evidence from such witnesses. The District Judge denied this motion immediately prior to commencing the trial.

After presentation of that evidence allowed by the District Court, the case was submitted to the jury. The jury "deliberated" for three to five minutes and returned a verdict of guilty on each count. Petitioner was sentenced to imprisonment for five months on count one and for one year on count two, with the sentence as to count two suspended and Petitioner placed on probation for a period of three years.

Petitioner appealed the conviction to the Court of Appeals for the Sixth Circuit. On appeal Petitioner argued that the District Court committed prejudicial error in denying Petitioner his right to present competent, material evidence in his defense; in conducting the trial in a biased, prejudicial manner with the trial judge acting as prosecutor and jury as well as judge;

in denying Petitioner's request for Jencks Act statements with no attempt to follow statutory procedures; in applying, on the same issues, one standard for the government and another standard for the defendant; and in applying an erroneous definition of criminal willfulness.

Petitioner's conviction was affirmed in a Per Curiam Opinion of the Court of Appeals (Appendix A), which recognized merit in some of Petitioner's contentions but held the erroneous actions of the trial court to be harmless. A timely Petition to Rehear with Suggestion of Appropriateness of Rehearing En Banc was filed; which Petition was denied (Appendix B). Petitioner filed a Motion for Stay of Mandate which was granted on July 3, 1979 (Appendix C).

REASONS FOR GRANTING THE WRIT

1. This Court Now Has the Opportunity to Correct the Holding of the Court of Appeals for the Sixth Circuit That Denial of a Criminal Defendant's Right to Present His Defense Is Harmless Error and to Clarify for All Courts the Standards to Be Applied in Determining Whether Deprivation of Constitutional Rights Is Prejudicial.

Petitioner in this case was charged with two counts of willful failure to timely file individual income tax returns. Of the three elements of that offense (sufficient gross receipts to require the filing of a return, failure to file the return by a specified date, and that the failure be willful), only the third—willfulness—was in dispute.

The prosecution relied upon evidence of Petitioner's background and vocation, the gross receipts of his accounting practice and his teaching salary, and Petitioner's filing history to prove willfulness. Petitioner agrees it is proper for a trier of fact to consider circumstances such as these. Petitioner attempted to introduce evidence to rebut and explain the evidence of the prosecution and to show circumstances which would have indicated the late filing was not criminally willful. The trial judge refused to allow this evidence to be adduced.

To prove Petitioner's income, the prosecution introduced a list of receipts on accounts receivable of Petitioner's accounting practice totalling $36,311.10 in 1973 and $40,779.22 in 1974, and displayed on a blackboard for the judge and jury these total amounts. Individual clients of Petitioner then testified concerning total amounts they had paid Petitioner for accounting work during these years. All these amounts were added to the blackboard. On cross-examination of these clients, however, it was proven these amounts were *all* included in the first-posted totals and were thus duplications. Not only was the Petitioner denied an opportunity to explain the amounts written on the blackboard, the duplicated amounts were left in sight of the judge and the jury until closing argument, at which time counsel for the Petitioner insisted these amounts be removed from the blackboard.

Petitioner testified and attempted to prove the amount of his income. The trial judge allowed Petitioner to introduce into evidence his partnership tax

returns and his individual income tax returns, but neither the judge nor the jury examined them. When Petitioner was asked the first question concerning his income from the partnership, the trial judge interjected his own objection and ruled that evidence inadmissible, although earlier in the trial, the trial judge had given the government wide latitude in introducing evidence concerning the amount of Petitioner's income.

Petitioner contends that that evidence is admissible and is vital. Had the prosecution been using this evidence only to show that Petitioner met the requirements for filing a tax return (testified to as being $750.00 for each year) only one witness would have been necessary. Instead, a virtual parade of witnesses testified to quite large amounts of money paid to Petitioner—all of which were duplications by virtue of having been included in the total first posted. Petitioner is well aware that a large income with large resulting tax liability is the most frequent circumstance relied upon by the prosecution to prove and by the courts to uphold a finding of criminal willfulness. Petitioner is also aware that his share of the accounting partnership gross receipts is the proper factor to be considered in determining a requirement to file. However, because a finding of willfulness is necessary for a failure to timely file a tax return to be criminal, the difference between gross receipts and income is relevant and material for the trier of fact to be enabled to give that circumstance a reasoned and proper consideration, especially since that difference is not commonly appreciated by the vast numbers of the

populace who work for wages which are annually reported to them by their employer on a form W-2.

While the prosecution was allowed full authority to present large—and misleading—figures to the judge and jury, Petitioner was not allowed to present the *facts* concerning his income. The single concession made was allowing Petitioner to introduce his tax returns—but these were not examined by anyone. The vital importance of this issue to Petitioner is revealed by the trial judge who, during a bench conference with counsel, stated: "He didn't file them because *he wanted to make money off of somebody else*" (TR 207), and again, "The reason is that *he wanted to make money* . . ." (TR 208), and again, ". . . whatever number of hours he spent working day and night *to make money* . . ." (TR 208). At least one of these instances was audible to the jury. The trial judge then cross-examined the Petitioner, saying, ". . . you elected to spend your time *making money off of somebody else* . . . is that not correct?" (TR 210). (Petitioner denied the correctness of that statement.) When the prejudicial effect of such one-sided evidence is so obvious on that person in the courtroom most trained and experienced in judicial proceedings, one cannot sanely doubt the prejudicial effect on the jury.

Petitioner continued in his defense to try to put into evidence the circumstances which resulted in the late filing of his tax returns. The trial judge reluctantly allowed Petitioner to introduce his time records into evidence and to testify to the extraordinarily large amounts of time expended attempting to maintain those

books and records which his background as an auditor and comptroller taught him to be necessary and proper for a complete and correct accounting to be made to his clients, his government, and himself.

The Court's attitude towards all of Petitioner's evidence is revealed (TR 197):

> By the Court: . . . I don't think this is even material, but they claim that's their defense, and if they can convince the jury of it, I guess they've got a right to do it, but I think it's . . .
>
> By Mr. Clark: We think it's material on the question of willfulness.
>
> By the Court: I don't think it is admissible on the basis of willfulness. I think the whole—now, you may convince the jury, which is what you're trying to do, but I think—well, anyhow, go on.

However, when Petitioner attempted to introduce some of his records, the trial judge said, "I sustain the objection . . ." (None had been made.) And he refused to allow further presentation of Petitioner's records.

The Court of Appeals for the Sixth Circuit did not comment on the exclusion of Petitioner's evidence concerning income, but agreed that the trial judge's refusal to admit evidence concerning records was error. That Court concluded that, because "of the overwhelming evidence of [Petitioner's] guilt" the error was harmless. Petitioner contends that any evidence not allowed to be explained or rebutted will be "overwhelming" in the hands of a skilled advocate. That

Court is thereby holding that the circumstances presented by the prosecution not only are probative of the possible existence of criminal willfulness but are *conclusive* and *irrebuttable* evidence of that state of mind, placing the administration of criminal justice today in harmony with that which prevailed in England when Sir Walter Raleigh could only argue that the prosecution had not completely proved its case.

This Honorable Court has guarded and defended the right of a person to be fully heard, even in non-criminal matters. Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 71 S. Ct. 624 (1951), wrote:

> This Court is not alone in recognizing that *the right to be heard* before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Much more recently, this Court decided *Faretta* v. *California,* 422 U. S. 906, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). There Mr. Justice Stewart, writing for the majority, stated:

> The rights to notice, confrontation, and compulsory process, when taken together guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the [Sixth] Amendment consitutionalizes the right in an ad-

versary criminal trial to make a defense as we know it.

In his dissent, Mr. Chief Justice Burger, succinctly stated:

> In short, both the "spirit and the logic" of the Sixth Amendment are that every person accused of crime shall receive the *fullest possible defense* . . ." (Emphasis supplied.)

2. This Court Now Has the Opportunity to Refine the Guidelines for the Trial Judiciary of the Country in Fulfilling Their Duty to Properly Conduct Fair and Impartial Trials.

This Honorable Court has rarely spoken on the subject of the necessity of the trial judge's maintaining a judicial role in the conduct of a trial and his duty to guide and control the proceedings in such a manner as to assure the parties a fair and impartial trial. The Courts of Appeals for the various circuits, however, have been confronted with such questions many times and have dealt with them in a myriad of decisions.

The trial judge, in the conduct of Petitioner's trial, abandoned his proper role as impartial judge and moderator of the proceedings taking place before him and assumed the role of prosecutor. Apparently having been convinced by the prosecution's evidence in chief of the Petitioner's guilt of the charged offense, he constantly conveyed to the jury this belief through the method and manner of his participation in the trial.

The second witness for the Petitioner was a former employee. From the beginning of his testimony the

trial judge impatiently interjected himself into the trial, refusing to allow Petitioner's counsel to proceed with the examination of the witness in an orderly fashion. When the witness was first asked about his time records, the trial judge interrupted with "He doesn't know what you're asking him yet. That's what he wants to know; ask him first—what do you want to ask him?" (TR 154-155) When meaningful testimony could not be elicited from the witness without the witness having access to his time records, the trial judge impatiently ordered Petitioner's counsel to "Pass them [the time records] up to him. Let's get some specific information around here!" (TR 157)

Throughout the testimony offered on Petitioner's behalf, the trial judge "sustained objections" which had not been made, assumed the role of interrogator, and admonished Petitioner's counsel with "All right—go on to something else" (TR 193) and similar statements indicating his disinterest in Petitioner's evidence. During the testimony of Petitioner, the trial judge evidenced, as detailed above, the conclusiveness (to him) of the prosecution's evidence of Petitioner's income. Significantly, even upon the sentencing proceeding, the trial judge stated:

> . . . and the only reason he gave for not filing his returns was that he was more interested in making money than he was in complying with the law . . .

and

> and for a lawyer [Petitioner had, between the years here involved and the trial of the case, completed his legal education and passed the Tennessee bar examination] to get up here and say that, it shocked me to the very roots of my being . . . but to have a lawyer get up here and say that he is more interested in making money than he was in complying with the law is just absolutely absurd and unheard of.

No such testimony can be found in the record of the trial of this cause.

Again, the Court of Appeals for the Sixth Circuit considered the isolated questioning of Petitioner on cross-examination by the trial judge and found it to be "dangerously close" to violating the principles of judicial conduct. However, that Court failed to consider that the incident was only one of many and the culmination of the obvious attitude and actions of the trial judge in his refusal to consider that evidence which was introduced and to allow the introduction for consideration of vital evidence on Petitioner's behalf. In Petitioner's case the trial judge's actions were not a small part of a long, arduous trial, the importance of which would be greatly diminished as the trial progressed, but permeated the entirety of Petitioner's attempt to present his defense. The judge's constant participation in the Petitioner's case in chief challenged and denied Petitioner the opportunity to present his defense in an orderly, proper manner, and attacked the credibility of the testimony of Petitioner

and his witnesses in a case in which the only issue to be decided was whether Petitioner's admitted action (or non-action) was criminally willful.

While many reported cases approve an amount of judicial participation in examination of witnesses for purposes of clarification (for example, *United States* v. *Burch,* 471 F. 2d 1314 [6th Cir. 1974]); a judge's participation during trial (whether in the form of interrogating witnesses, addressing counsel, or other conduct) must never reach the point at which it appears clear to the jury that the court believes the accused is guilty. *United States* v. *Nazzaro,* 472 F. 2d 302 (2nd Cir. 1973). Particularly analogous also is *United States* v. *Brandt,* 196 F. 2d 653 (2nd Cir., 1952).

3. This Court Now Has An Opportunity to Clarify the Identity of Material Subject to Disclosure to a Defendant Under the Jencks Act, 18 U.S.C. §3500, and the Procedural Requirements Placed Upon the District Court Proceedings By That Act.

The last witness to testify for the prosecution in its case in chief was Internal Revenue Service Special Agent Larry Hollingsworth. Special Agent Hollingsworth testified at some length concerning his investigation of the Petitioner, that he had interviewed "all the clients of Mr. Dark that I was able to locate" (TR 145); and at some length concerning transactions with Premium Acceptance Corporation. Following his testimony counsel for Petitioner requested Jencks Act material:

> By Mr. Clark: May it please the Court, we respectfully ask under the Jencks Act for Mr.

> Hollingsworth's report or statement so that we may review that before cross-examining him. (TR 145)

Upon the representation of the prosecuting attorney that statements had been provided, and defense counsel's explanation that he had received copies of interview reports of conversations with the Petitioner under Rule 16 relating to pre-trial discovery, the trial judge continued:

> By the Court: Have you given him everything he's testified about, Mr. Windsor?
> By Mr. Windsor: Yes, Your Honor.
> By the Court: Ready, Mr. Clark?

The trial court thus foreclosed Petitioner's statutory right to discover Jencks Act statements of the Special Agent in a manner presaging his attitude towards Petitioner's attempts to present his defense.

The Court of Appeals for the Sixth Circuit held that "Agent Hollingsworth's written case reports are not his 'statements' under 18 U.S.C. §3500(e), and the trial court was under no obligation to examine the file *in camera,* since there was 'no basis for belief that a Jencks Act "statement" existed other than those already furnished defense counsel.' *United States* v. *Nickell,* 552 F. 2d 684, 687-90 (6th Cir. 1977), *cert. denied,* 436 U. S. 904 (1978)." There are so many judicial decisions to the contrary that 5 A L R 3rd 763, §5 states, "All papers written by a government witness himself or his amanuensis which are in the possession of the government are statements within the meaning

of clause (1)." Non-production of revenue agents' memoranda brought reversal by this Honorable Court in *Clancy* v. *United States,* 365 U. S. 312, 81 S. Ct. 645, 5 L. Ed. 2d 574 (1961). Numerous tax cases considered by Courts of Appeals of other circuits have considered the producibility of such reports and the procedures to be followed in the District Courts. For example, the Eighth Circuit held in *Jacobs* v. *United States,* 279 F. 2d 836 (1960) that denial of defendant's motion to examine *all reports and statements* made by such agents to the government was error. The Seventh Circuit, in *United States* v. *Keig,* 320 F. 2d 634 (1963), held that once the defendant had raised an issue of Jencks Act statements, the District Court was required to make its own determination of producibility after examination of the file instead of relying on representations of government counsel. That circuit reiterated in *United States* v. *Cleveland,* 477 F. 2d 310 (1973) that the report of an Internal Revenue Service Special Agent was producible as a statement under the Jencks Act, remanding the case for further proceedings. On appeal from the District Court's finding that Cleveland had not been prejudiced by non-production, the circuit court, in 507 F. 2d 731 (1974) reversed the conviction. Petitioner thus contends that the holding in his case is in conflict with the decisions of this Honorable Court and with decisions of other circuits.

Additionally, Petitioner respectfully submits that the decision of the Court of Appeals for the Sixth Circuit, *U. S.* v. *Nickell, supra,* cited as authority for the decision in this case, represents a dangerous departure

from the most basic principles of criminal justice embodied in our Constitution and tradition. The majority opinion in that case admits, "Routine judicial screening, however, would pose no such problem [revealing unrelated confidential government information] *and might on occasion contribute to a more just result.*" 552 F. 2d at 689. (Emphasis supplied.) The opinion continues, however, to hold that such screening would place too great a burden on trial judges. Petitioner submits that the principles upon which this country is based requires a re-affirmation of the succinct statement of the late Judge William Miller, writing for the same Court in *United States* v. *Crane,* 499 F. 2d 1385, at 1388:

> Yet justice, not judicial economy, is the first principle of our legal system. And under no circumstances may well-intentioned efforts to conserve judicial time be permitted to prejudice the fundamental right of a criminal defendant to a fair trial.

4. This Court Has An Opportunity to Supervise the Administration of Criminal Justice in the Trial Courts of the Land By Refusing to Tolerate the Application of Different Standards to Actions and Evidence Concerning the Same Issues for Prosecution and Defense and Has An Opportunity to Clarify for All Courts the Definition of Criminal Willfulness.

Prior to the trial of Petitioner, subpoenas issued under the seal of the court were served upon witnesses for the defense and prosecution. Service of these subpoenas subjected the recipients to an Order of the

issuing court—i.e. they had been ordered to appear and testify and were subject to the power and process of the court should they refuse to obey. The returned subpoenas issued on behalf of the Petitioner were properly filed in the public court record. Those which had been issued on behalf of the prosecution, however, were, by order of the government attorney, withheld from the public record and given to the United States Attorney. Petitioner moved the District Court to order the filing of these orders (subpoenas) in the public record, or, in the alternative, to enjoin the testimony at trial of these witnesses. This motion was denied immediately prior to trial. The argument relied upon to support the denial of the motion is the established view that a criminal defendant is not entitled to the prosecution's "witness list." Petitioner avers that this statement is not responsive to Petitioner's contention. Petitioner believes that returned subpoenas, carrying court sanctions for disobedience, are orders of the issuing court and therefore properly part of the public record. Should *either* party to a dispute wish to keep secret the identity of his witnesses, he may either make arrangements for the proposed witness to be available without subpoena or may present to a judge the compelling reasons requiring secrecy or sealing of the court orders. The Conference Committee Notes regarding Rule 16, Federal Rules of Criminal Procedure, state, ". . . it is not in the interest of the effective administration of criminal justice to require that the government *or the defendant* be forced to reveal the names and addresses of its witnesses before

trial . . ." (Emphasis supplied.) Petitioner believes that the dual standard here applied is insupportable. Petitioner contends that *all* court orders are public records and should be treated as such. If, however, subpoenas are for some reason exempt from public view, then *all* subpoenas should be exempt. The double standard is not supportable.

The standard to be applied to determine the relevance and materiality of proffered evidence differed for the prosecution and the Petitioner. The prosecution was allowed to present in its case in chief gross receipts of Petitioner far in excess of the $750 testified to as the amount which required the filing of a tax return. Evidence of income in excess of $750 is relevant, then, only as a circumstance showing willfulness. After having given the government wide latitude in introducing evidence concerning amounts of income, the trial judge changed the standard of relevance and refused, without objection from the government, to admit Petitioner's relevant evidence on the same issue.

The question of the existence of an accounting partnership, first introduced in the prosecution's case in chief, became of vital importance in that it bore directly on the credibility of Petitioner. Petitioner testified directly that there was a partnership (TR 186). The prosecution, in rebuttal, called William Jordan who testified that he had never been in an accounting or CPA partnership with Petitioner (TR 254). On cross-examination, however, Mr. Jordan testified: (1) that he and Petitioner agreed to do accounting work together, splitting any resulting income or loss between

them, and (2) that they actually did that (TR 255). This testimony established, as a matter of Tennessee law (the Uniform Partnership Act) the existence of the accounting partnership. The trial judge allowed this testimony, instructing the jury that these facts bore "only" on the credibility of Petitioner (TR 260), but in his charge to the jury neglected to charge that as a matter of *law* the facts testified to by both witnesses legally established the existence of the partnership. On such a point of law, proper and complete instructions must be given by the trial judge without request, and the omission was, therefore, plain error affecting substantial rights of Petitioner. The trial judge thus found the evidence to be "relevant enough" to admit for consideration, but not "relevant enough" to properly and completely explain in his charge.

Petitioner thus would urge this Court to affirm the principle enunciated by the Court of Appeals for the Seventh Circuit in *U. S.* v. *Parker,* 447 F. 2d 826 (1971), that on any given issue it is imperative that the trial court apply the same standard to both parties.

The definition of willfulness as used in the criminal tax statutes has caused the courts great difficulty. Its importance lies in the fact that this element is that which distinguishes a taxpayer's civil liability for failure to timely file a tax return from a criminal liability for that action (or non-action). During argument of Petitioner's case in the Court of Appeals for the Sixth Circuit, a judge asked, "He knew he should file and he didn't do it—that's willful, isn't it?" Petitioner believes that statement reveals the erroneous standard utilized in his case and indicates the con-

fusion surrounding the term necessitating clarification from this Court.

CONCLUSION

The decision of the Court of Appeals for the Sixth Circuit recognized error of the District Court in denying Petitioner his Sixth Amendment right to present his defense, but failed to perceive that very denial as the *cause* of the evidence of guilt being "overwhelming"—because unrebutted—which thus *necessarily* affected the substantial rights of the Petitioner. Furthermore, the assumption by the District Court of the functions of prosecutor and trier of fact, the non-compliance of the trial judge with clear statutory procedures encompassed in 18 U.S.C. §3500, and the application by the trial judge of one standard on the government and another standard on the Petitioner, all resulted in fundamental injustice to the Petitioner denying him his Fifth Amendment entitlement to due process of law. This Court alone can correct that fundamental injustice. The present Petition for Writ of Certiorari should, therefore, be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5237

UNITED STATES OF AMERICA *Plaintiff-Appellee* *v.* JOEL H. DARK *Defendant-Appellant*	ON APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed May 4, 1979.

Before: ENGEL and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

PER CURIAM. Appellant Dark was convicted of two counts of willfully failing to file income tax returns, in violation of 26 U.S.C. § 7203 (1976), after a jury trial in the United States District Court for the Middle District of Tennessee. He was sentenced to five months' imprisonment on count one and to one year's imprisonment on count two, the latter sentence suspended in favor of three years' probation.

The government's evidence was plainly sufficient to support the verdict. During 1973 and 1974, Dark was self-employed as a certified public accountant, he taught elementary accounting at Tennessee State University in Nashville, and he attended law school at night. His total receipts on accounts receivable from his accounting practice amounted to $36,331.10 in 1973 and $40,779.22 in 1974. In 1973 he received a salary of $5,420 from Tennessee State.

He failed to file income tax returns for either year, despite the fact that he had been specifically warned by the Internal Revenue Service of his obligation under the law to file timely returns. Dark had failed to file his returns for the years 1967-1971 until March 1973, when he learned that he was under investigation by the IRS. At that time, Dark assured the IRS that he would comply with all filing requirements in the future.

Dark's defense was that his failure to file had not been "willful." He testified that his financial books and records were simply "not in shape to file a tax return" on the respective due dates, principally because of the complicated and cumbersome nature of his personal accounting system, and that the pressures of his accounting practice and legal studies had distracted him from properly maintaining his books. The jury deliberated only five minutes before returning its verdict of guilty on both counts.

Dark raises numerous claims of error on appeal, most of which are wholly without merit. He contends that the testimony of certain witnesses subpoenaed by the government should have been excluded at trial because the Assistant United States Attorney had instructed the Marshal not to place the returned subpoenas in the case file in the district court clerk's office, thereby preventing defense counsel from looking at the case file to find out who was going to testify for the government. The short answer to this claim is that defense counsel was not entitled to know, in advance of trial, who was going to testify for the government. *United States* v. *Conder,* 423 F. 2d 904, 910 (6th Cir.), *cert. denied,* 400 U. S. 958 (1970).

Dark contends that the district judge committed reversible error during jury selection by telling the panel, in the course of explaining the presumption of innocence and burden of proof in a criminal case, that "Neither side has the edge." Read in context, the remark was apparently calculated to impress upon the prospective jurors that both

parties in a criminal case come before the court with equal dignity and that neither should be arbitrarily favored out of prejudice for or against the government or defendants as a class. While perhaps better left unsaid, the remark could not have confused the jury, especially in light of the district judge's more than adequate explanation of the defendant's presumption of innocence and the government's heavy burden of proof in his other comments to the panel during jury selection and in his instructions at the close of the trial.

Dark also argues that the trial judge erred in refusing to order the government to turn over to defense counsel, as "statements" under the Jencks Act, the contents of IRS Special Agent Hollingsworth's case file after Hollingsworth's testimony at trial, without at least inspecting the file *in camera* to determine whether it contained any Jencks material. Agent Hollingsworth's written case reports are not his "statements" under 18 U.S.C. § 3500(e), and the trial court was under no obligation to examine the file *in camera,* since there was "no basis for belief that a Jencks Act 'statement' existed other than those already furnished defense counsel." *United States* v. *Nickell,* 552 F. 2d 684, 687-90 (6th Cir. 1977), *cert. denied,* 436 U. S. 904 (1978).

Dark's two remaining claims of error are more troublesome. Both involve actions of the trial court, which, Dark argues, unfairly hampered the presentation of his defense.

Dark sought to introduce in evidence some of his personal financial records in an effort to corroborate his claim that his personal record-keeping system was so complicated that it would have been difficult, if not impossible, to prepare accurate tax returns by the dates required by law. The trial judge ruled that the records were irrelevant and refused to admit them. We think this was error. The records were plainly relevant to Dark's defense, lame though it might have been.

The other incident occurred during the prosecutor's cross-examination of Dark. Dark testified, "I do not think I could have done [the 1973 and 1974 tax returns] under the circumstances under which I was laboring. On the due date my books were not in shape to file a tax return." At that point, the trial judge interrupted to ask the following question: "Well, the reason your books were not in shape is that you elected to spend time making money off somebody else and not keep your own books up, is that not correct?"

This Court has only recently had occasion to observe that "potential prejudice lurks behind every intrusion into a trial made by a presiding judge" and that, when such intrusion occurs, the judge must "sedulously avoid all appearances of advocacy as to those questions which are ultimately to be submitted to the jury." *United States* v. *Hickman,* Nos. 78-5148-49 (6th Cir. February 15, 1979), slip op. at 3. The question propounded by the trial judge here came dangerously close to violating his principle, for it could have created the impression in the minds of the jurors that the trial judge was unsympathetic to Dark's defense, a matter which was for the jury, and the jury alone, to evaluate.

In light of the overwhelming evidence of Dark's guilt, however, we do not believe that either the erroneous exclusion of Dark's financial records or the trial judge's isolated intrusion into the cross-examination of Dark affected Dark's substantial rights. Rule 52, FED. R. CRIM. P.

Accordingly, it is ORDERED that the judgment of conviction be, and hereby is, AFFIRMED.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5237

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

JOEL H. DARK - - - - *Defendant-Appellant*

ORDER—Filed June 13, 1979

Before: ENGEL and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

No judge of the Court having moved for rehearing *en banc,* the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-5237

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

JOEL H. DARK - - - - *Defendant-Appellant*

ORDER STAYING MANDATE—Filed July 3, 1979

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, Clerk